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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

MICHAEL EDWARD PINCH

Petitioner

-against-

STATE OF NORTH CAROLINA

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF NORTH CAROLINA

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QUESTIONS PRESENTED

1. Whether North Carolina has violated the Sixth and Fourteenth Amendments as interpreted by Witherspoon v. Illinois, 391 U.S. 510 (1968), by employing its rule that prospective jurors expressing more than general objections to the death penalty may be excused for cause to exclude:

(a) a juror who did not think she could impose the death penalty; and

(b) a juror who could consider the death penalty but would lean towards life imprisonment?

2. Whether petitioner's death sentence was imposed without full individualized consideration of mitigating factors regarding his mens rea, character, mental development, family relations, and remorse for his crimes so as to constitute cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the United States Constitution?

3. Whether the North Carolina Supreme Court misinterpreted Furman v. Georgia, 408 U.S. 238 (1972), in construing its death penalty statute to require - instead of permit - a capital verdict if the jury made three separate fact findings regarding aggravating circumstances when the sole ground for the holding was the court's belief that its construction of the statute was compelled by this Court's decisions condemning unbridled jury discretion?

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NO. 82 -

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

MICHAEL EDWARD PINCH

Petitioner

-against-

STATE OF NORTH CAROLINA

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF NORTH CAROLINA

Petitioner, Michael Edward Pinch, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of North Carolina in this case.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of North Carolina is reported at ___ N.C. ___, 292 S.E.2d 203 (1982), and is attached as Appendix A.

JURISDICTION

The opinion of the Supreme Court of North Carolina was issued on June 2, 1982. The judgment of the Supreme Court of North Carolina was issued on June 22, 1982, and is attached hereto as Appendix B. On July 23, 1982, Justice Brennan extended the time for filing this petition to and including August 31, 1982. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3), petitioner having

asserted below and asserting herein deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides, in relevant part:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . .."

and the Eighth Amendment to the Constitution of the United States, which provides:

> "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted."

and the Fourteenth Amendment to the Constitution of the United States, which provides, in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This case also involves the North Carolina death penalty statute, N.C. Gen. Stat. §15A-2000 et seq., which is attached as Appendix C.

STATEMENT OF THE CASE

On January 29, 1980, the petitioner was arrested in Anaheim, California, pursuant to a Law Enforcement Bulletin, by the Anaheim police for two murders committed in Greensboro, North Carolina. Rpp. 151-153. On February 4, 1980, the petitioner was indicted for two counts of first degree murder. Rpp. 3-4. The case was tried as a capital case with the trial beginning on August 25, 1980. Rp. 52. The jury was death qualified and, after the State presented all its evidence, the jury returned verdicts of guilty of two counts of first degree murder. Rp. 273.

The facts recited below concerning the crimes will be taken substantially from the facts as stated by the North Carolina Supreme Court in its decision. State v. Pinch, 292 S.E.2d at 210-212. The State's evidence came from primarily two sources: (1) the petitioner's confessions and (2) the testimony of five of his friends. Prior to trial all five were charged with the first degree murder of the two victims in this case. At trial all five testified for the State.

"In relevant part, the evidence for the State tended to show the following. On October 16, 1979, defendant, a nineteen year old white male, was walking on Merritt Drive in Greensboro with his friend Jimmy Eanes when he happened to meet Freddie Pachaco. Defendant did not like Pachaco because he had been friendly with a girl defendant liked and had, without proper entitlement, worn the personal insignia ('colors') of a motocycle gang on his jacket. On this occasion, defendant told Eanes that he 'hated that punk' (Pachaco) and wanted to fight him right then and there. This did not occur, however, because Pachaco was conciliatory and offered defendant some marijuana. The group then went to a trailer where they smoked marijuana and drank beer. Sometime later, Pachaco asked defendant outright whether he was 'after' him. Defendant replied that he was not and further said that 'if [he] was going to kick [Pachaco's] ass, [he] would have already done it.'

"On the following day starting at about noon, several people began to congregate at the trailer, where defendant apparently lived, to drink beer and listen to music. The merrymakers included Jimmy Eanes, Shawn Feeney, Keith Way, Bill Stanley and Leslie Hearl (who later married Stanley before trial). Pachaco and his friend Tommy Ausley also unexpectedly joined the party and brought two cases of beer.

Everybody was calm and pleasant and seemed to be having a good time. However, defendant told several of his friends during the course of the party that he disliked, or didn't have 'much use for,' Pachaco and said he would like to kill him. Later in the evening, defendant took Feeney's shotgun and fired at the clothesline three times. A deputy sheriff came to the trailer to investigate the disturbance, but he soon departed after talking to defendant.

"Upon defendant's suggestion, everyone decided to leave the trailer and go to the Stroker Motorcycle Clubhouse, which was located in some woods near Kendover Avenue in Greensboro. Defendant had reasoned that they could make as much noise as they wanted to out there and get more beer besides. It was approximately 10:00 p.m. While everyone prepared to move, defendant quickly slipped out to a nearby trailer where he borrowed a shotgun. He returned with the gun and told Eanes to ride with Pachaco and Ausley to make sure they got to the clubhouse. The entire party then proceeded to the rendezvous in various vehicles, caravan style. En route, defendant retained the shotgun and told his companions that he was going to kill Pachaco and Ausley.

"When the group arrived at the clubhouse, defendant opened the door while he continued to hold the shotgun. Once inside, the members of the party played games, drank beer and listened to music. Billy Stanley and Leslie Hearl left the company and went into an adjacent room to have sexual intercourse. While everyone else engaged in these various recreational activities, defendant sat silently behind the bar with the shotgun in his lap. Sometime later, defendant gave his knife to Eanes and instructed him to cut Pachaco's jugular vein and promised to back him up with a shotgun. Eanes attacked Pachaco but only succeeded in

cutting him on the throat. Pachaco became all emotional at this point but did not fight back. Ausley attempted to help Pachaco and was confronted by Eanes who threw a chair at him. At this point in the evening's events, the testimony of the eye-witnesses differed somewhat. Nevertheless, the overall weight of that testimony combined with the evidence of defendant's own pre-trial statements to law officers tended to show the following occurrences.

"Immediately after the throat-slashing incident between Eanes and Pachaco, defendant raised the shotgun and pointed it at Pachaco. Pachaco told defendant, 'I will go down laughing.' Without saying a word, defendant shot him in the chest. Defendant then turned toward Ausley, whom he had never seen before that day. Ausley pleaded with defendant and said, 'don't shoot me,' '[n]o, not me.' Defendant shot him anyway. Pachaco was still moaning. Defendant walked over to where he lay helpless on the floor and shot him again at point blank range just below the heart. Pachaco and Ausley died from the gunshot wounds. During the shootings, defendant had 'a sort of grin' on his face.

"Defendant, apparently with a full realization of what he had just done, walked outside to the porch of the club-house and told Feeney and Way that he had 'blown away' two dudes. He then directed everyone to help him dispose of the bodies. The bodies were placed in an automobile which Eanes drove to Causey Street and abandoned in a ditch. Defendant did not return to his residence; instead, he went home with Stanley and Hearl. On the way, he told Stanley that he had killed Pachaco and Ausley because he 'didn't have any use for people like that.' Defendant was not upset and seemed to have no regrets about the murders. He went to sleep. The next day, Stanley and Hearl returned to the clubhouse at

defendant's behest and cleaned up the blood on the floor. Another member of the Stroker motorcycle gang painted the steps to conceal bloodstains.

"The bloody car and bodies of Pachaco and Ausley were discovered in the early morning hours of October 19, 1979. Defendant took a bus to California where he was subsequently arrested on January 18, 1980. Defendant waived extradition on February 4, 1980, and was picked up by two officers of the Greensboro Police Department two days later. During the flight back to North Carolina, defendant made a full confession to the murders. He was advised of his constitutional rights and executed the required waiver form.

"Defendant presented no independent evidence during the guilt determination phase of the proceedings. The defense did, however, elicit evidence during cross-examination of prosecution witnesses tending to show that defendant was drunk when the killings occurred." State v. Pinch, ___ N.C. ___, ___-___, 292 S.E.2d 203, 210-212 (1982); Appendix A.

During the sentencing phase, two aggravating circumstances were submitted to the jury: (1) Was the murder heinous, cruel and atrocious, and (2) Was the murder part of a course of conduct in which Michael Edward Pinch engaged and did that course of conduct include the commission by the petitioner of other crimes of violence against another person. 292 S.E.2d at 212. The State did not present any evidence and rested on the evidence in the guilt phase. The State argued that the murders were especially heinous, cruel and atrocious. To show that the defendant engaged in a course of conduct that included the commission of other crimes of violence against another, the State used one murder (Pachaco's) for the crime of violence as to Ausley and used Ausley's murder for the crime of violence as to Pachaco.

Petitioner put on evidence to support numerous mitigating circumstances. His evidence showed that he was 19 at the time of the homicides. He had been living on his own since the age of 13. His mother and father had been divorced for a long time and the petitioner had been close to his father. When the mother remarried and found out that her new husband had homosexual tendencies, she sent petitioner to live with his father. From that point on, he was on his own. He never stayed with his father. He was constantly drinking and taking drugs. Witnesses testified that there was not a day when petitioner was not on drugs or drinking. Rpp. 289-291, 286.

Dr. Billy Royal testified that when he examined petitioner for competency, he found out that petitioner had liver problems that were the result of long and heavy drinking. He testified that the tests he performed showed that petitioner had an I.Q. of 66 and showed signs of depression, conflicts relating with people and poor judgment. He testified that petitioner's depression was ongoing, chronic and had been long standing. Rp. 284. Dr. Royal also testified that he had discussed the homicides with petitioner. At the time of his interview, petitioner felt no particular remorse about the killing of Pachaco. He felt like there was just no alternative. Rp. 285. He did, however, feel remorse and confusion about the killing of Ausley. Rp. 285. Dr. Royal concluded by stating that based on his conversations with petitioner and the tests that he performed, he did not think that the petitioner was basically a violent person. There was also no evidence from the tests or conversations that petitioner, in anything he said or did, was attempting to manipulate the system or con anyone. Rp. 285.

Dr. Allen Sherrow testified for petitioner as an expert in the diagnosis and treatment of persons addicted to alcohol and drugs. Dr. Sherrow testified that petitioner had a long history of drug and alcohol abuse, going back to the age of 12. Rp. 293. Dr. Sherrow had discussed with petitioner the use of alcohol on the night of the homicides. Dr. Sherrow stated that he was unable to determine the amount of alcohol petitioner consumed and whether that level affected petitioner because he was not given access to the other witnesses. Rp. 293. He testified that he could not give an opinion to a medical degree of certainty as to whether the petitioner was affected by the consumption of alcohol at the time of the homicides. He had an opinion based on what the petitioner had told him, but he was not permitted to express that opinion. Rpp. 295-296. See Appendix D14-D17.

The petitioner attempted to introduce other evidence in mitigation, most of which related to his remorse about the crimes, his changed attitude, his desire to change and lead a useful life, his feelings of sorrow and regret for causing pain to his family, his love for his family and friends and his regret for prior drug addition and overdoses. This evidence was excluded by the court. Rpp. 287, 288, 297-299, 278, 285. See Appendix D4-D11.

After arguments to the jury and the court's instructions, the jury returned a verdict of death on both counts. The jury found both aggravating circumstances beyond a reasonable doubt. Rpp. 341, 344. It found that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty. Rpp. 342, 344. It found some (or at least one) mitigating circumstance, but was directed by the court not to indicate which mitigating

circumstance(s) it found. Rpp. 342, 345, 335. The jury then found that the mitigating circumstances did not outweigh the aggravating circumstances and was therefore directed to return verdicts of death, which it did. Rpp. 336, 343, 346.

From the judgments of conviction and sentences of death, the petitioner appealed. The decision of the Supreme Court of North Carolina affirming the convictions and sentences was issued on June 2, 1982. ___ N.C. ___, 292 S.E.2d 203; Appendix A.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. Petitioner asserts that two prospective jurors were removed from his jury in violation of the limitations imposed by Witherspoon v. Illinois, 391 U.S. 510 (1968). The trial record showing the voir dire examination of prospective jurors Mary D. Neal and Frank J. Rogers is set out at Appendix D1-D4.

Petitioner noted in the record appropriate exceptions, Rpp. 102, 68, and made the following assignment of error:

> The Court erred in excusing for cause jurors Rogers . . . and Neal because of their views about capital punishment in violation of the principles as established by the United States Supreme Court in Witherspoon v. Illinois, and subsequent cases.

Rp. 358. He argued this contention in his brief. Defendant-Appellant's Brief, pp. 12-27.

The majority below rejected the contention regarding prospective juror Rogers along with six others by the assertion:

> It is unmistakably clear that seven of the eight potential jurors were properly excused according to this standard after they each stated unequivocally that, even before hearing any evidence in the case, they could not under any circumstances impose the death penalty upon this defendant.

292 S.E.2d at 213.

It specifically overruled petitioner's argument regarding Mary Neal, citing State v. Avery, 299 N.C. 126, 261 S.E.2d 803 (1980):

> It is equally clear that the remaining juror, Mary Neal, was also correctly removed from the panel when, after some initial equivocation, she finally stated that she did not 'believe' that she could impose the death penalty regardless of the evidence. The court thereupon asked her, 'Do I understand that you could not even before you hear the testimony under any circumstances, impose the death penalty?' Ms. Neal replied, 'No, I just don't think so.' Considering her answers contextually, we find that Ms. Neal expressed a sufficient refusal to follow the law, that of capital punishment, which might become applicable to the case. State v. Avery, 299 N.C. 126, 137, 261 S.E.2d 803, 810 (1980).

Ibid.

Justice Exum dissented from these holdings. 292 S.E.2d at 236-240. He concluded that "[a]t least two jurors were excluded for cause in the instant case in violation of the limitation imposed by Witherspoon v. Illinois, 391 U.S. 510 (1968) . . .." Id. at 236-237.

He found that the most that could be said about Ms. Neal was that "her attitude toward the death penalty 'affected' her deliberation . . ." as in Adams v. Texas, 448 U.S. 38 (1980), which would be insufficient cause for exclusion under Witherspoon. 292 S.E.2d at 240.

> Neal never 'unmistakably' said that she would not impose the death penalty, or that she would 'automatically' vote for life imprisonment, regardless of what the evidence might show. She said she didn't 'believe' and didn't 'think' she could vote for death. She never said, absolutely, that she could or would not. She should not have been excused for cause.

Ibid.

Rogers' statement that he "would lean toward life imprisonment" was not, for Justice Exum, altered by his assent to the trial court's question.

> Thus Rogers did not say that he could or would not impose the death penalty or that he would automatically vote for life imprisonment, regardless of evidence that might be introduced at the trial. He said he could not impose it under any circumstances 'without hearing any

evidence.' Obviously, the learned trial judge was attempting to ask Rogers whether he could impose it under any circumstances regardless of what evidence adduced at trial might show, and to one trained in the law that is what the court's question might mean. To Rogers, a layman, the question could mean no more than what the words actually used by the trial judge would ordinarily convey. Rogers' position, then, was simply that he could not impose the death penalty until he at least had heard some evidence in the case. The thrust of the entire colloquy seems to be that, depending on what the evidence adduced tended to show, Rogers could consider the death penalty, that he tended to favor life imprisonment, but that he would not convince himself one way or the other without hearing some evidence. Rogers should not have been excused for cause.

Ibid. (Emphasis in original).

2. Petitioner is urging here that his jury was improperly limited in its consideration of mitigating circumstances in several respects.

(a) How Raised in Trial Court

(i) Petitioner testified during the penalty phase of his trial. A police officer had earlier testified that after his arrest, petitioner had said he had not regretted killing Pachaco. Petitioner was questioned about this:

> After the shootings I recall being arrested in California. I recall making some statements to the Greensboro Police Department after I had been arrested. I remember telling the officers that I did not regret shooting Freddie Pachaco.
>
> Q. Michael, how do you feel about that now?
>
> A. I regret it.
>
> MR. WANNAMAKER: Object to how he feels about it now, if your Honor please. It is irrelevant.
>
> THE COURT: Objection sustained. EXCEPTION NO. 119
>
> I have changed in the way I feel about Freddie Pachaco and the shootings. I've been away from drugs and drinking and everything and I've been locked up and my head has been cleared. I've done a lot of thinking about it. As a result of

> that thinking, I regret that I did it. It's the biggest mistake I've ever made in my life. I have completed the ninth grade. Rp. 278.

(ii) Sherry Olivey, a friend of petitioner's, testified in the penalty phase. Testimony from her about his use of alcohol and drugs before and after the crimes and about his remorse for his crimes was excluded. The relevant portions of her testimony are set forth at Appendix D4-D6.

(iii) During the direct examination of petitioner's mother, Louise Nixon, petitioner sought to introduce five letters from him to her written while he was in jail pending trial on these charges. The trial court excluded two of the letters in their entirety and portions of two others. The portions of the trial record showing Mrs. Nixon's testimony and the letters are set out at Appendix D6-D11.

(iv) Petitioner presented an expert witness, Dr. Allen Sherrow, a psychiatrist, with training and experience in alcohol and drug abuse and forensic psychiatry. Dr. Sherrow was called to give his opinion regarding the effect of the alcohol petitioner had consumed prior to the shooting. During jury selection, petitioner filed a motion requesting an order permitting Dr. Sherrow to interview the State's witnesses who observed petitioner during the period of his incarceration so that the doctor could express an opinion as to the effect on petitioner of his alcoholic consumption. The portions of the record showing petitioner's motion, the order denying it and the proceedings leading to its denial are reproduced at Exhibit D11-D13.

When Dr. Sherrow testified, the Court sustained a series of objections by the State to questions seeking to elicit his opinions regarding effects of petitioner's alcoholic consumption. Dr. Sherrow's testimony is reproduced at Appendix D14-D17.

(v) The petitioner, pursuant to established practice, filed a timely written request to the trial court as to those mitigating circumstances, both statutory and otherwise, for consideration by the jury which he contended were supported by the evidence. It included:

> Offer of Mitigating Circumstances (filed September 9, 1980)
>
> NOW COMES the defendant, by and through counsel, pursuant to N.C.G.S. 15A-2000(f), and offers the following mitigating circumstances to be considered by the jury in these cases:
>
> • • • • •
>
> 7. The defendant . . . has a relatively low mentality. Rpp. 274-275.

The trial court refused to so instruct the jury. The record specifically shows:

> The Court refused to submit to the jury as a possible mitigating circumstance defendant's low mentality.

Rp. 277.

(b) How Presented and Raised in the North Carolina Supreme Court.

(i) Petitioner grouped all of the exceptions to the rulings listed above excluding evidence, 2(a)(i)-(iv), supra, under the following assignment of error.

> The defendant was denied his right to be free from cruel and unusual punishment; his right to present a defense, his right to a fair sentencing trial and his right to due process of law when the Court prevented the

> defendant from presenting relevant, material evidence in mitigation of the crimes charged, all in violation of the Eighth and Fourteenth Amendments to the United States Constitution . . ..

Rp. 369. Petitioner brought forward this assignment of error in his brief. Defendant-Appellant's Brief, pp. 52-56.

(ii) Petitioner made the following additional assignment of error regarding the ruling denying his request that the State make its witnesses available to Dr. Sherrow, see 2(a)(iv) supra:

> The Court erred in denying the defendant's Motion to Allow Witness Interviews by the defendant's Medical Expert and in doing so deprived the defendant of his right to effective assistance of counsel, the right to present a defense, a fair trial, a fair sentencing proceeding, due process of law and equal protection all in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution . . ..

Rpp. 358-360. This assignment of error was presented in petitioner's brief. Defendant-Appellant's Brief, pp. 28-30.

(iii) Petitioner made the following assignment of error regarding the court's refusal to submit his low mentality as a mitigating circumstance, 2(a)(v), supra:

> The court erred in denying defendant's motion to submit as a mitigating circumstance the defendant's low mentality in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

Rp. 368. Petitioner argued the assignment of error in his brief. Defendant-Appellant's Brief, pp. 61-63.

(c) How Passed on by North Carolina Supreme Court

(i) The court below rejected defendant's argument that mitigating evidence was wrongly excluded. 292 S.E.2d at 219-220. The court

explicitly recognized that petitioner's argument was grounded in his right "to be free from cruel and unusual punishment" and cited Lockett v. Ohio, 438 U.S. 586 (1978). Id at 219. It stated its general view on admissibility of mitigating evidence as follows:

> The circumstances of the offense and the defendant's age, character, education, environment, habits, mentality, propensities and criminal record are generally relevant to mitigation; however, the ultimate issue concerning the admissibility of such evidence must still be decided by the presiding trial judge, and his decision is guided by the usual rules which exclude repetitive or unreliable evidence or that lacking an adequate foundation.

From this proposition, however, it set forth the following harmless error rule:

> Consequently, we believe that a new sentencing hearing should not be ordered by this Court for the trial judge's exclusion of evidence at the penalty phase unless the defendant demonstrates the existence of patent, prejudicial error.

Ibid.

(ii) With respect to the exclusion of petitioner's testimony regarding his remorse for the death of Pachaco, 2(a)(i), supra:

> It is true that the trial court sustained an initial and single objection to defendant's testimony about his current feelings of remorse over Pachaco's death; nevertheless, defendant thereafter proceeded to testify in detail about his change in heart and regret without further objection by the prosecutor. Record at 278-79. In addition, Dr. Royal, a forensic psychiatrist, testified about defendant's expressed remorse over Ausley's death. Record at 285.

Ibid.

(iii) As to the exclusion of the O'Ivey testimony on petitioner's remorse, (2)(a)(ii), supra:

> Since substantial evidence of defendant's regrets had already been received, it was not error for the court to exclude (upon objection)

further testimony upon the same subject by the witness Sherry Olivey. In any event, defendant later succeeded in introducing more evidence about his repentant statements since the killings through the testimony of his sister and mother. Record at 289, 291-92.

Ibid.

Regarding excluded evidence from her on petitioner's difficulties with drugs and alcohol:

> Defendant also maintains that the trial court erred in not permitting Sherry Olivey to testify about the circumstances of his various hospitalizations for drug overdoses. We disagree. Ms. Olivey testified that she knew of occasions where defendant had taken a drug overdose and that she had visited him in Cone Memorial Hospital three months after the crimes. Certainly, defendant's habits regarding alcohol and drug misuse were relevant mitigating factors for the jury's consideration; however, the precise details of his particular overdoses were not pertinent to his sentencing. It was enough that the jury was informed by Ms. Olivey that:
>
> > I can honestly say that he [defendant] drank or took something every day that I've known him [two years] . . .. He always went to the max on everything to where he couldn't walk anymore or was passed out. I have seen him when he has gone too far in the use of alcohol or the use of drugs. I have seen him take alcohol or drugs to the point where he is unconscious or in some state like that. Record at 286-87.
>
> Id. at 220. (Emphasis in original).

(iv) Regarding the refusal to admit letters from petitioner to his mother from the Guilford County Jail, 2(a)(iii), supra,

> We likewise find no reversible error in the trial court's limited admission of defendant's five proffered exhibits consisting of letters he had written to his mother while he was incarcerated pending trial. These letters added little to the in-court testimony of defendant and his witnesses about his present awareness of what he had done and his sorrow for it. Even so, the trial court permitted defendant's mother to read to the jury all of exhibit five and portions of exhibits three and four in which defendant had essentially stated, both in prose and poem, that it hurt him to know that he was capable of taking another's life, that he was living for the

> future and cleaning up his act, and that he had a mature and sincere desire to fulfill his part in life and society properly. Record at 297-99. The letters totally excluded by the court, exhibits one and two, merely repeated the same things, howbeit using different words or examples, about his remorse and his wish to be a better person. Moreover, these two letters included much material which plainly was not relevant to sentencing, i.e., his apologies to his mother for not having been a better son to her despite her good efforts and his rambling philosophical questionings about why he had turned out to be so bad.

Id. at 219-20.

(v) With respect to the testimony of Dr. Sherrow, (2)(a)(iv), supra, the court acknowledged that petitioner's arguments were constitutionally based, 292 S.E.2d at 213, 219, but rejected them, id. at 213-215; 219-220.

> Defendant finally challenges the trial court's refusal to admit certain expert testimony. These contentions lack merit . . .. The trial court also properly excluded the opinion of another psychiatrist about defendant's blood alcohol levels at the time of the shootings. Clearly, such evidence would have been relevant; however, as the doctor plainly admitted that he could not render an opinion within a reasonable degree of medical certainty, the evidence was unreliable and lacked probative value.

Id. at 220.

(vi) With respect to petitioner's claim that the trial court should have charged and included on the list submitted to the jury as a mitigating factor that the "defendant has a relatively low mentality," the majority of the court acknowledged:

> that the trial court must include additional factors [to those listed in the statute, N.C. Gen. Stat. §15A-2000(f)], that are timely requested by the defendant, on the written list submitted to the jury if they are 'supported by the evidence, and . . . are such that the jury could reasonably deem them to have mitigating value . . ..' State v. Johnson [I], 298 N.C. 47, 72-74, 257 S.E.2d 597, 616-17 (1979) (emphasis added).

Id. at 223. It further concluded that a defendant's mentality is generally a factor in mitigation, but that petitioner's request was somehow off the mark.

> We first analyze defendant's request for an instruction upon his 'relatively low mentality.' This factor is not listed in G.S. §15A-2000(f); however, our cases plainly indicate that the mentality of a defendant is generally relevant to sentencing and that it can, with supporting evidence, be properly considered in mitigation of a capital felony. See State v. Johnson, 298 N.C. 355, 367, 259 S.E.2d 752, 760 (1979), and part VII of the opinion, supra. In this case, a psychiatrist testified that defendant had scored 66 on an intelligence test. This fact unquestionably related to defendant's mentality, and we believe defendant would have been entitled to an instruction about his specific intelligence quotient if he had tendered a properly worded request therefore. See, e.g., State v. Williams, 304 N.C. 394, 401, 284 S.E.2d 437, 443 (1981); State v. Rook, 304 N.C. 201, 211 n.1, 283 S.E.2d 732, 739 (1981), cert. denied, ___ U.S. ___, 102 S.Ct. 1741, 72 L.Ed.2d 155 (1982). However, we do not believe that defendant's evidence adequately authorized the submission of the instruction he did request which used the terms 'relatively low mentality.' In this regard, the psychiatrist testified that defendant's 'other tests indicated that his I.Q. was probably a little higher than [66] and fell at least into the low-normal range of intelligence.' Although we are not schooled in the medical art of psychiatry, we think that one would not commonly understand low to normal intelligence to be reasonably synonymous with relatively low mentality. Consequently, we hold that the trial court did not err in refusing to instruct the jury in this respect.

Id. at 224. (Emphasis in original).

It further held that, even if erroneous, the error was harmless:

> In any event, the omission could not have possibly been prejudicial since the trial court told the jury it could evaluate '[a]ny other circumstances or circumstances arising from the evidence which you, the jury deem to have mitigating value.' G.S. 15A-2000 (f)(9).

Ibid.

The court had previously ruled that a defendant has the burden of "affirmative establish[ing]

. . . that, considering the case as a whole, the exclusion of the factor from the jury's consideration resulted in ascertainable prejudice to the defendant." Id. at 223-24.

Justice Exum dissented on this point. 292 S.E.2d at 240-242. He believed that the evidence fully supported petitioner's request:

> The evidence supports that he did have a 'relatively low mentality.' It should be for the jury to assess this quality in terms of its mitigating effect. It is not for the court to say that the jury could not, as a matter of law, consider a person's 'relatively low mentality' as a mitigating circumstance because the mentality is within the outer limits of 'normal.' To me, the phrase 'relatively low mentality' accords precisely with the evidence which was introduced. A person whose intelligence is in the low-normal range must perforce have a relatively low mentality. Contrary to the majority's conclusion, the terms are synonymous.

Id. at 241.

Moreover, concluding based on Eddings v. Oklahoma, ___U.S. ___, 102 S.Ct. 869, 877, 71 L.Ed.2d 1, 12 (1982), that the mitigating circumstances of petitioner's mental development could not, consistent with the Eighth Amendment, be limited, 292 S.E.2d at 241, and that the burden of establishing that the error was harmless was on the State to prove beyond a reasonable doubt, he thought the error was not harmless. Id. at 241-242.

3. The trial court charged the jury that, "it would be your duty in each case . . . to recommend that the defendant be sentenced to death," R.p. 336, upon making certain fact findings. In the record on appeal, petitioner noted an appropriate exception, R.p. 336, and made an assignment of error, complaining that the "court erroneously instructed

the jury that if the jury found the aggravating circumstances outweighed the mitigating circumstances they must return a recommendation for the death penalty . . .." R.p. 373. At the time of petitioner's trial, no contemporaneous objection was required to preserve an error in the jury instruction for appellate review. N.C. Gen. Stat. §15A-1446(d)(13). N.C. Gen. Stat. §15A-1446(d)(13) provides:

> (d) Errors based upon any of the following grounds, which are asserted to have occurred, may be the subject of appellate review even though no objection, exception or motion has been made in the trial division . . . . (13) Error of law in the charge to the jury.

Petitioner argued at length in his brief on appeal, Defendant-Appellant's Brief, pp. 75-96, that "the court improperly directed the jury to automatically recommend a sentence of death if it found that the aggravating circumstances are sufficiently substantial to call for the imposition of the death penalty and that the aggravating circumstances outweigh the mitigating circumstances." Id. at 75. The State argued in response that the construction of the statute urged by petitioner would violate the Eighth and Fourteenth Amendments as interpreted by this Court. Brief for State, pp. 67-73. It summarized its position with the following assertion: "If the jury were allowed to make the further decision requested by the defendant, the jury would be allowed to engage in the very type of unbridled discretion which Furman [v. Georgia, 408 U.S. 238 (1972)] simply does not allow." Id. at 72.

Petitioner had anticipated the State's argument in his brief in chief. See Defendant-Appellant's Brief, pp. 79-86, 88, 91. A recapitulation of petitioner's position was:

> If the Georgia statute approved in Gregg [v. Georgia, 428 U.S. 153 (1976)], is sufficiently guided, if the Florida statute approved in Proffitt [v. Florida, 428 U.S. 242 (1976)] has sufficient standards, and if the Model Penal Code is also constitutional, then, under G.S. §15A-2000, as written, and with the construction

> urged here, the 'jury's discretion' is more than sufficiently 'channelled,' 'it is always circumscribed by legislative guidelines.' Gregg, 428 U.S. at 206-07. This must be so because G.S. 15A-2000 contains more standards and requires more findings than any of the other three.

Id. at 88.

The North Carolina Supreme Court divided on the constitutional question argued by the parties. The majority concluded that the instructions given were proper, 292 S.E.2d at 226-227, because petitioner's construction of the statute would allow the jury "arbitrarily or capriciously [to] impose or reject a sentence of death" and "to exercise unbridled discretion . . .." 292 S.E.2d at 227. It further determined that petitioner's "contention was implicitly answered in State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979) . . ." and quoted from that case where it had said that "'[t]he exercise of such unbridled discretion by the jury under the court's instruction would be contrary to the rules of Furman [v. Georgia, 408 U.S. 238 (1972)] and the cases which have followed it.' Id. at 35, 257 S.E.2d at 590." 292 S.E.2d at 227.

Justice Exum dissented. 292 S.E.2d at 230. He wrote:

> The majority construes that statute in this way on the sole ground that otherwise the statute would be subject to the constitutional attack that a jury could decide between life and death in its unbridled discretion. Yet decisions of the United States Supreme Court . . . have made it abundantly clear that the majority's interpretation is not constitutionally required.

Ibid. He proceeded to determine that the instruction given was inconsistent with the statute and "tilts too much in favor of consistency at the expense of individualized consideration." 292 S.E.2d at 236. See, also, id. at 234. He, therefore, thought petitioner should receive a new sentencing hearing. Id. at 242.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER THE NORTH CAROLINA SUPREME COURT'S INTERPRETATION OF WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968) ALLOWING FOR EXCLUSION OF JURORS WHO DO NOT CATEGORICALLY STATE THEY COULD NOT IMPOSE DEATH IN ANY CASE DEPRIVES PETITIONER OF HIS LIFE WITHOUT DUE PROCESS OF LAW.

A. The "I don't believe so" juror.

In the Court below the petitioner claimed that the exclusion for cause of juror Mary Neal was in violation of this Court's decisions in Witherspoon v. Illinois, 391 U.S. 510 (1968); Davis v. Georgia, 429 U.S. 122 (1976), and Adams v. Texas, 448 U.S. 38 (1980). Mrs. Neal was excused for cause after she had expressed her feelings concerning the death penalty in the following manner:

Q. Do you have any objection to the death penalty?

A. Well, that's a hard question to answer.

Q. Yes, ma'am.

A. I've never been able to answer it like a cut and dried thing. It's hard for me, very hard for me to make decisions, I've never been able to make decisions very well. I had someone to help me, but I'm hard to convince too. I almost have to see something before I could really say so. That's the only way I know to answer you.

Q. Let me ask you that question in a different way.

A. All right.

Q. First of all, you don't have any objection to the death penalty generally, is that what you're saying or do you?

A. Well, there again, I really don't know. It's just hard to say. I guess if you knew for a fact, if I saw something done, I would go along with it.

Q. Let me ask that question in a different way, Mrs. Neal, if you're a member of this jury and we get to the second part of the trial, that means you've already found him guilty of murder in the first degree in one or both cases, based on the evidence in this case, what happened in this case and based on the law that Judge Walker gives to you, as he tells you the law, if you deem it to be appropriate, could you impose the death penalty?

A. I don't think so, I really don't believe so.

Q. I understand this is a tough area, but we have to inquire about this now and everyone is entitled to their own opinion. Are you saying, ma'am, that you could not and you would not vote to impose the death penalty in this case, regardless of the evidence.

A. I don't know. I guess if it was proven to me, I guess I could.

Q. If what was proven to you?

A. I would have to be -- I would have to absolutely know for sure, I mean no doubt whatsoever.

Q. Now understand you would have already found him guilty of murder in the first degree or we would not be at the sentencing phase, so his guilt would have been established or you would not have found him guilty. At this point you would be determining what sentence to impose based on the law that the Judge gives you and based on the facts, based on what he did, what you've already found him to have done. At that point, could you impose the death penalty if you found it to be appropriate and in accordance with the law that the Court gives you or would you not -- would you simply not impose the death penalty under any circumstances? I have to kind of keep after you on this point because it is crucial.

A. I still don't know, I'd rather not.

Q. You would rather not -- can you envision a situation where you could impose the death penalty?

A. Like I said, if I saw it happen.

Q. You mean if you were an eyewitness to the crime?

A. Right.

Q. You are not going to be that.

A. That's right.

Q. As a juror, can you envision a situation where you would impose the death penalty, you're not going to be an eyewitness, you're going to have to act on what other people tell you they saw or heard.

A. Okay, already proven guilty -- if I went along with the guilty part, if I decided they were guilty -- no, I will not.

Q. You could not impose the death penalty regardless of what the evidence is?

A. I don't believe so.

MR. WANNAMAKER: If your Honor please, we challenge for cause.

THE COURT: I understand, Mrs. Neal. I know this is very difficult for you but it's necessary to have your candid and frank answers and I thank you for them.

Do I understand that you could not even before you hear the testimony under any circumstances, impose the death penalty?

MARY D. NEAL: No, I just don't think so.

Rpp. 100-101. See also, State v. Pinch, (Justice Exum's dissent), 292 S.E.2d at 239.

A divided[1] North Carolina Supreme Court held in reliance upon State v. Bernard Avery, 299 N.C. 126, 261 S.E.2d 803 (1980), that Ms. Neal was properly excused.

> Considering her answers contextually, we find that Ms. Neal expressed sufficient refusal to follow the law, that of capital punishment, which might become applicable to the case. State v. Avery, 299 N.C. 126, 137, 261 S.E.2d 803, 810 (1980); See State v. Taylor, 304 N.C. 249, 266, 283 S.E.2d 761, 773 (1981).

Pinch, 292 S.E.2d at 213.

The North Carolina Supreme Court has had numerous cases raising the question of whether certain jurors were excused for cause in violation of Witherspoon v. Illinois, supra.[2]

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1 Justice Exum dissented. 292 S.E.2d at 236-240.

2 State v. Spence and Williams, 274 N.C. 536, 164 S.E.2d 593 (1968); State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969); State v. Ruth, 276 N.C. 36, 170 S.E.2d 897 (1969); State v. Roseboro, 276 N.C. 185, 171 S.E.2d 886 (1970); State v. Miller, 276 N.C. 681, 174 S.E.2d 481 (1970); State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970); State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410 (1971); State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971); State v. Doss, 279 N.C. 413, 183 S.E.2d 671 (1971); State v. Chance, 279 N.C. 643, 185 S.E.2d 227 (1971); State v. Frazier, 280 N.C. 181, 185 S.E.2d 652 (1972); State v. Cook, 280 N.C. 642, 187 S.E.2d 104 (1972); State v. Anderson, 281 N.C. 261, 188 S.E.2d 336 (1972); State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974); State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974); State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975); State v. Monk I, 286 N.C. 509, 212 S.E.2d 125 (1975); State v. James Avery, 286 N.C. 459, 212 S.E.2d 142 (1975); State v. Simmons, 286 N.C. 681, 213 S.E.2d 280 (1975); State v. Bock, 288 N.C. 145, 217 S.E.2d 513 (1975); State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975); State v. Britt, 288 N.C. 699, 220 S.E.2d 283 (1975); State v. Smith, 290 N.C. 148, 226 S.E.2d 10 (1976); State v. Monk II, 291 N.C. 37, 229 S.E.2d 163 (1976); State v. Foddrell, 291 N.C. 546, 231 S.E.2d 618 (1977); State v. Squire, 292 N.C. 494, 234 S.E.2d 563 (1977); State v. Matthews, 295 N.C. 265, 245

With the exception of two cases which were tried prior to the decision in Witherspoon and involved exclusions based on general beliefs in opposition to the death penalty,[3] it has never vacated a death sentence as a result of Witherspoon.

There have been a series of cases involving jurors whose responses to the critical questions were, "I don't think so." In each of these cases, the defendant was granted no relief, although the court occasionally found that the jurors could not have been excluded under Witherspoon.

In State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974), the first of the cases, a prospective juror stated that he was against capital punishment and did not believe he could return a verdict that would result in a death sentence. The North Carolina Supreme Court held that this juror was properly excluded for cause with no explanation. The court merely stated that it was clear that the juror had already made up his mind. 284 N.C. at 687. In State v. Lampkins, 286 N.C. N.C. 459, 212 S.E.2d 142 (1975), the court followed Noell and found that the "I don't think so" responses were sufficient to exclude the jurors.

In State v. Monk I, 286 N.C. 509, 212 S.E.2d 125 (1975), 497, 212 S.E.2d 106 (1975), and State v. James Avery, 286 State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975), and State v. Johnson II, 298 N.C. 355, 259 S.E.2d 752 (1979),

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Footnote 2 concluded:

S.E.2d 727 (1978); State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979); State v. Johnson II, 298 N.C. 355, 259 S.E.2d 752 (1979); State v. Bernard Avery, 299 N.C. 126, 261 S.E.2d 803 (1980); State v. Oliver and Moore, 302 N.C. 28, 274 S.E.2d 183 (1981); State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981); State v. Pinch, ___ N.C. ___, 292 S.E.2d 203 (1982); State v. Williams, ___ N.C. ___, 292 S.E.2d 243 (1982).

3 State v. Spence and Williams, 274 N.C. 536, 164 S.E.2d 593 (1968); State v. Ruth, 276 N.C. 36, 170 S.E.2d 897 (1969).

the court apparently reversed itself and found that the jurors' responses of "I don't think so" were not sufficient under Witherspoon to conclude that they were "irrevocably committed" before trial. However, in these cases, the court granted no relief since it held further that jurors of this sort had not been systematically excluded. Its reading of Witherspoon that the exclusion of jurors must be systematic rather than just one, so as to entitle the defendant to a new sentencing hearing, was, of course, ultimately decided by this Court to be incorrect in Davis v. Georgia, 429 U.S. 122 (1976).

The court's view of whether jurors who stated that they did not think they could return a death verdict changed a third time beginning with State v. Bernard Avery, 299 N.C. 126, 261 S.E.2d 803 (1980). Realizing that its holdings in State v. Monk I, supra, State v. Bernard, supra, and State v. Johnson II, supra, that Witherspoon violations would be harmless if not systematic, were in error,[4] it held that once a juror indicates that he or she does not know or does not believe or does not think or is just unsure that he or she could impose or recommend death, that juror is "irrevocably committed" to vote against the death penalty and therefore could be excluded for causes under Witherspoon.

It established this standard by interpreting this Court's holding in Witherspoon to apply solely to those jurors who merely express general objections to the death

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[4] Davis v. Georgia, supra, was decided by this Court in 1976. The North Carolina Supreme Court, however, as late as State v. Johnson II, supra, issued in 1979, continued to apply a standard requiring systematic exclusion. It was not until 1980 that the Court apparently realized that their systematic exclusion standard had been overruled by this Court.

penalty or merely express conscientious or religious scruples against infliction of the death penalty. If a juror expressed more than general objections to the death penalty, then, according to the North Carolina Supreme Court, that juror may be excluded without violating Witherspoon. The court did not acknowledge that this holding overruled Monk I, Bernard and Johnson II to the extent that they had determined that such jurors were not properly excludable.

In Bernard Avery, the court established its current standard by interpreting this Court's holding in Witherspoon to apply solely to those jurors who merely express general objections to the death penalty or merely express conscientious or religious scruples against infliction of the death penalty. If a juror expressed more than general objections to the death penalty, then, according to the North Carolina Supreme Court, that juror may be excluded without violating Witherspoon.

> In Witherspoon the United States Supreme Court held that veniremen may not be excluded from a jury on general objections to the death penalty or based on expressed conscientious or religious scruples against infliction of the death penalty. See also State v. Monk, 286 N.C. 509, 202 S.E.2d 125 (1975), second appeal, 291 N.C. 37, 229 S.E.2d 163 (1976).
>
> It is clear that jurors Averette and Curbeam expressed more than general objections to the imposition of the death penalty. Each affirmatively stated that he could not impose the death penalty regardless of the evidence presented. On this record the fact that their negative responses were phrased "I don't believe I would" and "I don't think so" does not equivocate their refusal to follow the law as given by the judge to such an extent as to make their challenge for cause improper. See State v. Noell, 284 N.C. 670, 685-86, 202 S.E.2d 750, 760-61 (1974).

Avery, 299 N.C. at 137.

The Avery standard was again applied to an "I don't think so" juror in this case, 292 S.E.2d at 213. Thus, in Avery and this case, "I don't think so" is a "negative

response" by the court's mere assertion and by its understanding of Witherspoon that anything less than an unmistakeable assurance that a juror would return the death penalty is grounds for removal.

Finally, in State v. Williams, ___ N.C. ___, 292 S.E.2d 243, 249-252, the Avery device for excluding jurors with reservations about the death penalty is extended and applied to a juror who simply "does not know" and "is not sure" that she could vote for death. Even these answers, we are told, are under Avery "negative responses."

For fifteen years the North Carolina Supreme Court, despite this Court's repeated decisions reaffirming Witherspoon, has consistently shown that it will somehow or by some means avoid the dictates of Witherspoon so that jurors who might be affected by the decision to impose death will be excluded from juries. As Justice Exum stated in his dissent in this case, 292 S.E.2d at 238-39, a juror who states that he or she does not believe or think he could impose death is merely stating that the death penalty would affect his or her decisions. Cf. Adams v. Texas, 448 U.S. 38 (1980). The juror is not stating unequivocally that under no circumstances could he or she recommend death. The standard now applied in North Carolina, as noted by Justice Exum, is in conflict with this Court's decisions in Witherspoon, Davis v. Georgia, supra, and Adams v. Texas, supra. It is likewise in conflict with a recent federal Court of Appeals decision. Granviel v. Estelle, 655 F.2d 673 (5th Cir. 1981), cert. denied, ___ U.S. ___, 102 S.Ct. 1636 (1982). This Court ought to grant review of this case to resolve this conflict and explicitly hold that a juror who states she does not think she could impose death cannot be excluded for cause.

B. The "I'm life-prone juror."

In the Court below the defendant also claimed that the excusal for cause of juror Rogers was in violation of Witherspoon. As to his feelings concerning the death penalty, Mr. Rogers stated the following:

> Q. . . . [I]f you are selected as a member of this jury and assuming that the jury returns a verdict of murder in the first degree, guilty, and we get to the second phase, can you consider the imposition of both the death penalty as well as life imprisonment?
>
> A. That death penalty, I don't go for that too much.
>
> Q. Okay, let me go at it a different way. Do you have any religious, moral, ethical or any beliefs opposed to the imposition of the death penalty?
>
> A. Not really, except my own convictions.
>
> Q. I'm asking you now for your opinion and your convictions?
>
> A. I say I don't think much of the death penalty.
>
> Q. Okay. Let me go back and try it again. The law is that if the jury returns a verdict of first degree murder, and during a sentencing phase the State, me, establishes that there are aggravating circumstances as the Court will explain in his instructions as a matter of law as to what those are, then it is the jury's duty, sworn duty, to consider both. Now, after considering both you render the verdict that you and the other jurors deem appropriate, but your duty is to consider imposing both. Can you do that?
>
> A. I can consider, but as I say --
>
> Q. You tell me you would consider it but then you wouldn't do it, is that what you are saying?
>
> MR. HARRISON: Objection.
>
> A. (By witness) I said I would lean toward life imprisonment, if you want me to tell the truth about it, that's what I'm doing.
>
> Q. Yes, sir, I certainly do and I appreciate it and this is a difficult thing to ask.
>
> THE COURT: Let me ask him.
>
> MR. WANNAMAKER: Yes, sir.
>
> THE COURT: Mr. Juror, are you saying that before you have heard any evidence in this case, Mr. Rogers, if the defendant should be found guilty of either charge of murder in the first degree, without hearing any evidence, that under no circumstances would you return a

verdict which would result in the imposition of the death penalty?

MR. ROGERS: That is true.

Rpp. 67-68. See State v. Pinch, (Justice Exum's dissent), 292 S.E.2d at 240.

The above questions and answers were the entire voir dire of Mr. Rogers concerning his feelings about the death penalty.

The North Carolina Supreme Court, over the dissent of Justice Exum, simply held that based on the above examination:

> It is unmistakably clear that seven of the eight potential jurors [including Mr. Rogers] were properly excused according to this standard after they each stated unequivocally that, even before hearing any evidence in the case, they could not under any circumstances impose the death penalty upon this defendant.

Pinch, 292 S.E.2d at 213.

As Justice Exum noted in his dissent, 292 S.E.2d at 240, juror Rogers was likewise "unequivocally" or "categorically" opposed to the death penalty. The problem with the voir dire of Mr. Rogers, however, was not that his answers were equivocal, but that the questions asked were insufficient. The Witherspoon violation here was most aptly put by Justice Exum in his dissent.

> Thus Rogers did not say that he could or would not impose the death penalty or that he would automatically vote for life imprisonment, regardless of evidence that might be introduced at the trial. He said he could not impose it under any circumstances 'without hearing any evidence.' Obviously, the learned trial judge was attempting to ask Rogers whether he could impose it under any circumstances regardless of what evidence adduced at trial might show, and to one trained in the law that is what the court's question might mean. To Rogers, a layman, the question could mean no more than what the words actually used by the trial judge would ordinarily convey. Rogers' position, then, was simply that he could not impose the death penalty until he at least had heard some evidence in the case. The thrust of the entire colloquy seems to be that, depending on what the evidence adduced tended to show, Rogers could consider the death penalty, that he tended to favor life imprisonment, but that he would not convince himself one

way or the other without hearing some evidence. Rogers should not have been excused for cause.

Pinch, 292 S.E.2d at 240. (Emphasis in original).

This Court has made it clear that the meaning of voir dire colloquy is that which would be given it by the prospective juror rather than one trained in the law. "The critical question, of course, is not how the phrases employed in this area have been construed by courts and commentators. What matters is how they might be understood -- or misunderstood -- by prospective jurors." Witherspoon, 391 U.S. at 515-16, n. 9 (quoted with approval in Boulden v. Holden, 394 U.S. 478, 481-82 (1969); accord 292 S.E.2d 239 (dissenting Opinion of Exum, J.). Juror Rogers understood the court's question to mean merely that he had a predisposition to life sentences. That is, before he heard any evidence which might or might not change his mind, he would tend towards a life sentence. Juror Rogers was anything but "unequivocally" or "irrevocably" opposed to the death penalty. He was what a prospective juror and citizen may be expected to be, i.e., reluctant to impose a death sentence except in clear and extreme cases and even then only after the State has proven certain facts by its evidence. This Court ought to grant review to inform lower courts that the mandate of Witherspoon will be enforced. Jurors who express reluctance to impose death or who favor life before they hear the evidence cannot be excused for cause.

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE NORTH CAROLINA SUPREME COURT HAS SANCTIONED INCOMPLETE JURY CONSIDERATION OF MITIGATING CIRCUMSTANCES, IN CONFLICT WITH DECISIONS OF THIS COURT, BY ADOPTING RESTRICTIVE DEFINITIONS OF MITIGATING EVIDENCE AND DEFERRING TO THE VARYING JUDGMENTS OF TRIAL JUDGES ON RELEVENCE AND RELIABILITY OF PROFFERED MITIGATING EVIDENCE "UNLESS THE DEFENDANT DEMONSTRATES THE EXISTENCE OF PATENT, PREJUDICIAL ERROR."

The North Carolina Supreme Court made a series of rulings to sustain the trial court's limitations on the jury's consideration of critical mitigating evidence in ways wholly inconsistent with this Court's decisions in Woodson v. North Carolina, 428 U.S. 280 (1976); Lockett v. Ohio, 438 U.S. 586 (1978); Green v. Georgia, 442 U.S. 95 (1979); and Eddings v. Oklahoma, ___ U.S. ___, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). Accord, Enmund v. Florida, ___ U.S. ___, ___, 50 U.S.L.W. 5087, 5099-5101 (July 2, 1982) (Part III, dissenting Opinion, O'Connor, J).

The court below held: (1) that the petitioner's I.Q. of 66 could not be deemed to show he had a "relatively low mentality" to be considered by the jury as a mitigating circumstance, 292 S.E.2d at 222-24; (2) that material in letters from petitioner to his mother from the Guilford County Jail, containing "his apologies to his mother for not being a better son despite her good efforts and his rambling philosophical questions about why he had turned out to be so bad" was "plainly . . . not relevant to sentencing . . .," 292 S.E.2d at 220; (3) that a psychiatrist's opinion as to petitioner's blood alcohol level and the effect on him of consuming large quantities of beer prior to his offense was "unreliable and lacked probative value" where it was based on something less than "a reasonable degree of medical certainty," 292 S.E.2d at 220, and where the court had denied petitioner's request that the psychiatrist be permitted to interview State's witnesses so that he could form a more certain opinion, 292 S.E.2d at 214-215; (4) that the trial court did not err in sustaining the District Attorney's objections that questions of petitioner and a friend as to petitioner's remorse for the killings were irrelevant, Rpp. 279-80, on the ground that the evidence was repetitious since some evidence was received to this effect,

292 S.E.2d at 219; and (5) that trial court error in excluding mitigating material is harmelss "unless the [petitioner] demonstrates the existence of patent, prejudicial error," 292 S.E.2d at 219.

Review by this Court of these several holdings below is warranted to avoid the "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty," Lockett, 438 U.S. at 605; Eddings, 71 L.Ed.2d at 13-14 (O'Connor, J. concurring). They effect not only the lawfulness of petitioner's death sentences, but also others whose penalty trials are to be judged under those rules of admissibility and judicial review.

(1) Mental Development. Petitioner was 19 years old at the time of his crimes. He had a ninth grade education. His parents divorced when he was a child. He admired his father, who rejected him. He lived with his mother, in Connecticut, who was forced to work at two jobs until sometime after she remarried. She sent him to live with his father after she discovered her second husband was bisexual. He stayed only briefly with his father, in California, and then only briefly with his mother. He was unsuccessful in school and essentially on his own from about age 13.

He ended up in Greensboro, North Carolina, where his brother lived, a year or so before the killings. He took up with a motocycle gang, seeking the familial support which he had been lacking in his life.

At trial, a psychiatrist testified that he had a I.Q. of 66 and that he thought petitioner's intelligence fell into the "low-normal range." 292 S.E.2d at 224. Petitioner requested at trial that on the list provided the jury of potentially mitigating circumstances be included his "relatively low mentality," a request which was denied. In

North Carolina, juries are instructed, upon timely request, to consider as mitigating circumstances not only those as listed in the statute, N.C. Gen. Stat. §15A-2000(f), which are raised by the evidence, but also those requested and not listed in the statute. State v. Johnson I, 298 N.C. 47, 257 S.E.2d 597 (1979). Such non-statutory mitigating circumstances are also included on a written list provided to the jury "so that they will stand on an equal footing before the jury," with those statutorily listed. Johnson I, 257 S.E.2d at 617.

The majority below acknowledged petitioner's entitlement to the submission to the jury of a mitigating circumstance regarding his mental development. 292 S.E.2d at 224. It, however, thought his specific request, that he had a "relatively low mentality," was not supported by the psychiatrist's testimony. Ibid. Justice Exum dissented, believing that "the phrase 'relatively low mentality' accords precisely with the evidence which was introduced," 292 S.E.2d at 241, and that he was entitled, under the Eighth Amendment, to have the jury consider his "relatively low mentality." 292 S.E.2d at 240-41.

The majority also said any error in the failure to submit this circumstance to the jury was harmless. It held that in this context, "defendant [must] demonstrate . . . affirmatively . . . (3) that, considering the case as a whole, the exclusion of the factor from the jury's consideration resulted in ascertainable prejudice to the defendant." 292 S.E.2d at 223-24.[5] Again, Justice Exum

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5 Its harmless error test for exclusion of mitigating evidence was similar. "[W]e believe that a new sentencing hearing should not be ordered by this Court for the trial judge's exclusion of evidence at the penalty phase unless the defendant demonstrates the existence of patent, prejudicial error." 292 S.E.2d at 219.

disagreed, concluding that the error is plainly of a constitutional dimension since it has to do with the "mental . . . development," Eddings, supra. 102 S.Ct. at 877, 71 L.Ed.2d at 12, of a 19 year old defendant. Since this factor should be put to the jury on "equal footing" with other mitigating factors, it was error requiring a new trial. Id. at 241-42.

Review should, therefore, be granted to determine whether the decision below squares with the requirement of Lockett that all mitigating evidence be given full consideration by the sentencing jury and whether it is consistent with this Court's decisions requiring proper appellate review to avoid the risk of the infliction of death penalties where another penalty might have been warranted.

2. The Positive Qualities of Petitioner's Family Relationships.

Possibly the best evidence available to petitioner's court appointed counsel in their efforts to persuade the jury to spare his life, notwithstanding his terrible senseless crimes and an apparently aimless life centering on drugs, alcohol and motocycles, was a series of letters he wrote to his mother from the Guilford County Jail as he awaited trial. Appendix D8-D11.

The jury heard evidence of the inadequacy of petitioner's family background, his father's abandonment and rejection of him, his mother's inability to give him time and attention because of her need to work, his difficulties with his bisexual step-father and his being essentially set adrift at an early age. What it did not hear was the positive and wholesome relationship which had developed with his mother after his arrest. In his letters, he poured his heart out to her, expressing his love and devotion to her and his brother and sisters, his painful recognition of how

wrong he had been in rejecting her wholesome guidance, which had been accepted by her other children, his recognition of and remorse for the injury his life and terrible acts had caused her and the rest of the family, and his efforts to comfort her and his sisters. It was in these documents that a jury might find that whatever else he had been and done, he was a 19 year old boy possessed of human qualities valued by them.

The court below found this evidence irrelevant.

> Moreover, these two letters included much material which plainly was not relevant, i.e., his apologies to his mother for not having been a better son despite her good efforts and his rambling philosophical questions about why he had turned out to be so bad.

292 S.E.2d at 220.

The underscored portions of those two letters[6], set out below, are what the court determined to be irrelevant.

> 2/14/80
>
> Mom,
>
> I just received all the things you & lyn got me and I want you to know that I really appreciate it, I couln't ask for anything more. When I left the visiting room today I was the happyest man in the world, I almost cried.
>
> Ya know I really thought that after the way I acted when you let me come live with you in Memphis, you had figured just like Dad, That there was no way I would change or ever do anything for myself. I really realize how how I should have listened to you as a child and I'm sure it would have made me a better man than I am today. But Mom I truthfully belive its the old man's blood in me that took me down all these roads I've been down.
>
> (over)
>
> Now I think of how you worked so hard to bring all of us up the right way, and how I made no effort to make you proud of me, and I appologize for that with all my heart.
>
> I promise you Mom that one day I'm going to be somebody for you, the rest of the family and for myself.
>
> Ya know Mom I'm glad I wasn't around the house much these past years because I wouldn't of wanted Jennifer to dislike me. She really doen't know how her Big

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6 Substantial portions of two other letters were also kept from the jury. The portions of one are set out at Appendix D10-D11.

Brother was and I never want her to know because it would hurt her like it has hurt ya all.

Tell her I love her more than ever and one day I come see her. I don't know if you should Bring her to the penatenary, Maybe when she's older.

Tell Jenny that I'm praying for her every nite.

(2)

Excuse my penmenship, but ya know its kind of hard writing in the dark.

Im trying to get a light in my cell, Im sure Ill get one soon.

I hope to learn a trade in prison that will help me find work when I get out, if nothing else Ill know enough about the law to help other people.

Well, Moma Im going to go to sleep its late, bye the way I hope you and linda weren't out walking this late Because they delivered the stuff you all got me around 10:00 p.m.

I love you Mom, and I hope you you had a safe trip home.

"God Bless"
Mike

Defendant's Exhibit 1.

Appendix D9.

. . . . .

2/16/80

Mother

Hey Mom how are you doing? I thought Id write you and tell you the latest.

They moved me to another cell and its got a light in it.

Its also a little bit cleaner, Im pretty happy with it.

I wanted to write you again and tell you that your the best Mother anyone could ever have.

I've been doing alot of thinking and its a shame the way Ive treated you when you were trying to bring me up the right way.

I could say I'm sorry all day long but thats not going to help the hurt Im feeling now.

I think back when I was young and how hard you worked just so we could get by, and I havent done a thing but cause alot of hurt. (over)

Moma I know it hurt you bad when you found out what I was in jail for.

You dont need any more hurt, you've lived such a hard life with alot of hurt, and I realize now how much you have hurt.

I hope you forgive me for what Ive put you through.

Moma I want to prove to you so bad that I can be somebody its killing me, I swear it is, Im just praying to god I get out of prison before you get old and die on me.

I pray to god you life a long life Moma. You have to because Ive done you so wrong.

You look real heathy and beautiful now but if I get 50 years or life ill never get my chance.

Moma why couldn't I have been a good kid like linda and Bill and even Jenny, every kid you've ever had listened and did right except me.

Why is that I dont understand we came from the same Mom and I've come out from underneath the same roof and I had to be a [expletive omitted]. Why? Was that my choice or am I just mentally disturbed, you know I really wonder.

Moma I'm hurtin and I need you to answer these questions for me, please tell me what wrong with me.

I going to bed now and I will pray for you all,

I love you

Mike

P.S. I love you too Jenny.

Defendant's Exhibit 2.

Appendix D10.

. . . . .

There was nothing before the jury which otherwise[7] revealed to the jury the human qualitied he reflected by these letters.

Petitioner submits that what the court below has ruled irrelevant is precisely the sort of information which he is entitled, as a constitutional matter, to have the sentencing jury consider. The Court should grant certiorari to

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7 Of the five letters offered, all that was admitted was:

(1) An excerpt from Exhibit 3:

> It hurts me to know I could take a person's life, and it would probably hurt much more a I grow older; but it's done, and I'm living for the future now.

(2) An excerpt from Exhibit 4:

> Everything here is all right, and I slowly but surely, cleaning up my act; and it is really helping me out as far as getting along with people.

(3) Exhibit 5 and a "poem":

> 'Mom, I'm not feeling very well. I feel weak and have been laying down a lot; so I don't feel very much like writing, but here is a poem I wrote you all. I had a friend rewrite it because he's got a good handwriting. I hope you like it. It took me a while to finish it. I love you. Michael.'

The poem reads as follows:

consider whether this evidence which reveals petitioner's individual "uniqueness," Eddings, 71 L.Ed.2d at 8, through his love and concern for his mother, involves "the characteristics of the person who committed the crime," Gregg v. Georgia, 428 U.S. at 197, his "character," Woodson, 428 U.S. 280, 304, or his "family background, and personal history," Eddings v. Oklahoma, 71 L.Ed.2d at 12 (concurring Opinion of O'Connor, J.) so that its exclusion at trial would render his sentence violative of the Eighth Amendment.

3. Petitioner's Mens Rea. Dr. Sherrow, a psychiatric expert on alcohol and drug abuse, had examined petitioner for the purpose of providing his opinion of the effect of petitioner's drinking on him at the time of the crimes. The trial court had authorized up to $1,500 for his fee. Dr. Sherrow examined petitioner. He wanted independent evidence regarding the extent of petitioner's drinking and behavior

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Footnote 7 concluded:

> 'For my family. In the past when I was just -- it was just life and me, I often wondered if my family really cared of me; in that day and age I was evil and unkind, always had violence, drugs, and women on my mind. Now I have matured and love my family very much. After all the hurt I've caused, it's their heart I hope I've touched. My mother is beautiful. My brother and sisters are wise, and I hope to be with them one day hight up in the sky. So when that day of judgment comes to me and I'm up on my knees, I hope by then I fulfill my part in life and society. Now if I'm refused and sent to the depths of hell, I will lift my head and say to myself, "Michael, it's god's will." As I sit in my cell and pray and pray to seek god eveary night, it seems that I -- (unintelligible -- the witness is emotional)
>
> I would like to say to my family as I close my poem, no matter what happens, my love will always be with you as it is tonight. Michael.' Rpp. 296-299.

The portions of Exhibit 4, not put before the jury, are reproduced at Appendix D10-D11.

on the day of the crimes so that he could develop his opinion. Accordingly, petitioner moved the court for an order directing the State to make available six or so witnesses who had been with petitioner on the day and night of the crimes. Rpp. 51-52; 45-47. The order denying the request was affirmed on appeal. 292 S.E.2d at 214-215.

At trial, Dr. Sherrow was not able to express an opinion as to petitioner's blood alcohol level or the effect on him of his alcoholic consumption to a "reasonable degree of medical certainty," Rp. 294, because he had not been able "to talk to the eyewitnesses at the time of these events." Rp. 293. He defined "a reasonable degree of medical certainty being that none out of ten doctors in a similar situation as myself would, having viewed the facts as I have reviewed them, come up with the same opinion." Rp. 294. The doctor did have an opinion on these questions, but because he had not had access to the other data it was less certain than the standard he described. Rpp. 294-297.

The trial court, upon the State's objection, refused to allow Dr. Sherrow to give his opinions to the jury because it did not rise to the level of a "medical degree of certainty."

> A. Yes, I have an opinion. I cannot hold it to a reasonable degree of medical certainty --
>
> MR. WANNAMAKER: Well, objection.
>
> THE COURT: Objection sustained.

The North Carolina Supreme Court agreed that evidence on petitioner's "blood alcohol levels at the time of the shootings . . . would have been relevant." 292 S.E.2d at 220. "[H]owever, as the doctor plainly admitted that he could not render an opinion within a reasonable degree of

medical certainty, the evidence was unreliable and lacked probative value." Ibid.[8]

The question which emerges here is, in the context of these facts, whether the rigorous application of a state court rule of evidence may be invoked to prevent a psychiatrist from giving important evidence concerning petitioner's mens rea, a factor of paramount importance in any capital sentencing decision, Enmund v. Florida, ___ U.S. ___, ___, 50 U.S.L.W. 5087, 5092 (July 2, 1982); Enmund at 5099-5100 (Part III, dissenting Opinion of O'Connor, J.); Lockett v. Ohio, supra, at 616 (concurring Opinion of Blackmun, J.). The Court has held that state evidentiary rules must gave way in a capital sentencing hearing where the evidence is relevant to the sentencing decision and has sufficient indicia of reliability. Green v. Georgia, 442 U.S. 95 (1979) (per curiam). See, also, Witherspoon v. Illinois, 391 U.S. 510, 522 n. 20 (1968) ("Insofar as a determination that a man should be put to death might require 'that there be taken into account the circumstances of the offense together with the character and propensities of the offender,' Pennsylvania v. Ashe, 302 U.S. 51, for example, it may be appropriate that certain rules of evidence with respect to penalty should differ from the corresponding evidentiary rules with respect to guilt. See, e.g., Williams v. New York, 337 U.S. 241.") (Emphasis added.) The Court should grant certiorari to consider whether the wooden invocation of an evidentiary rule, without analysis of its necessity or the reasons why it could not be met comports with petitioner's right, under the

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8 The court also sustained the exclusion of testimony from Olivey regarding specific instances both before and after the crime of petitioner's drug and alcohol abuse. 292 S.E.2d at 220.

Eighth Amendment, not to be executed except after fair consideration by the jury of all matters which may have mitigating effect.

(4) Petitioner's Remorse For His Crimes. At trial, evidence was produced that after arrest petitioner expressed remorse for Ausley's death but not for the death of Pachaco. When he testified, he acknowledged making those statements. His lawyer questioned him about this:

> Q. Michael, how do you feel about that now?
>
> A. I regret it.
>
> MR. WANNAMAKER [Assistant District Attorney]: Object to how he feels about it now, your Honor please. It is irrelevant.
>
> THE COURT: Objection sustained.

Rp. 278. His friend, Sherry Olivey, who had visited with him in jail, was asked what he had told her about his feelings.

> Q. What statements, if any, has he made to you about his feelings about what happened on October 18, 1979?
>
> MR. WANNAMAKER: Objection.
>
> THE COURT: Sustained.

Rp. 288; Appendix D6.

The North Carolina Supreme Court held that neither of these rulings were significant since as to petitioner, his feelings as to remorse eventually got before the jury, 292 S.E.2d at 219, and as to Olivey, her testimony was repetitious of testimony given by petitioner's mother and sister. Ibid. It also noted that Dr. Royal had testified that petitioner had expressed to him regrets for killing Ausley.[9] Ibid.

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9 Of course the principal point here was petitioner's efforts to contend with his admitted earlier statements that he lacked remorse for Pachaco's death, which had also been repeated to Dr. Royal. Rp. 285.

It is true that evidence of petitioner's regret was before the jury. However, since the prosecutor in his argument at the guilt phase, Rp. 249, and in his concluding argument seeking petitioner's death insisted that petitioner should be convicted of first degree murder and executed because "[h]e's not sorry he killed; he's glad," Rp. 310, one would think that he should have been entitled to offer all the evidence that he had to refute the State's claim. Instead, the holding below is he, himself, cannot directly answer this charge, nor can his witness Olivey, because others have given such testimony.

There may have been greater harm to petitioner's case in the trial court's rulings than in the exclusion of the testimony. When the judge sustained the State's objection to the question about his present feelings on the ground that "how he feels about now . . . is irrelevant," Rp. 278, and made a similar ruling when the question was put to Olivey, Rp. 288, the jury was being told that his present feelings did not matter. The fact that some evidence of this sort did come in did not dispell the message from the judge that the evidence had little value.

Petitioner suggests that these rulings below again reflect an impermissibly narrow view of a defendant's rights to present mitigating evidence and that this Court should review them.

(5) Harmless Error. All of these holdings sustaining limitations on petitioner's efforts to show mitigation are informed by harmless error rules which promise only cursory appellate review and which tell trial judges that they may severely restrict defendants' presentation of mitigating evidence without fear of reversal.

The North Carolina Statute provides that "evidence may be presented as to any matter that the court deems relevant to sentence . . .. Any evidence which the court deems to have probative value may be received." N.C. Gen. Stat. §15A-2000(a)(3). The statute also seems to require careful appellate review. N.C. Gen. Stat. §15A-2000(d). It might have been expected that the court would exercise its review function under (d) supra to interpret (a)(3), supra, to insist that the capitally tried would be given appropriate latitude to present to the jury anything which might have mitigating value. Instead, the decision below demonstrates that the court reads (a)(3) to mean that the trial court's judgment as to what it "deems relevant" and what it "deems to have probative value" is nearly unreviewable.

> [T]he ultimate issue concerning the admissibility of such evidence must still be decided by the presiding trial judge, and his decision is guided by the usual rules which exclude repetitive or unreliable evidence or that lacking an adequate foundation. [citations omitted]. Consequently, we believe that a new sentencing hearing should not be ordered by this Court for the trial judge's exclusion of evidence at the penalty phase unless the defendant demonstrates the existence of patent, prejudicial error.[10]

292 S.E.2d at 219.

Accordingly, review here would necessarily resolve, in addition to the particular holdings complained of above, at least three important and related issues: (a) whether a capital sentencing statute, as construed, which leaves to the trial judge's nearly unreviewable discretion the admissibility of mitigating evidence in sufficiently

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10 As noted above, see text at footnote 5, the court also fashioned a similar harmless error test for failing to instruct on a mitigating circumstance. "[A] defendant demonstrates reversible error . . . in a capital case only if he affirmatively establishes . . . that, considering the case as a whole, the exclusion of the factor from the jury's consideration resulted in ascertainable prejudice to the defendant." Id. at 223-24.

"consistent and principled," Eddings, 71 L.Ed. 1, 8; (b) whether the North Carolina harmless error tests conflict with this Court's decisions that where error is of a constitutional dimension the burden is on the State to establish that it is harmless beyond a reasonable doubt, e.g., Chapman v. California, 386 U.S. 18 (1967); accord, 292 S.E.2d at 241 (dissenting Opinion of Exum, J.) and with this Court's death penalty cases requiring "that the prisoner sentenced to death is afforded process that will guarantee, as much as is humanly possibly, that the sentence was not imposed out of whim, passion, prejudice, or mistake," Eddings, 71 L.Ed2d at 13 (concurring Opinion of O'Connor, J.); and (c) whether the North Carolina court's harmless error tests render unconstitutional its death penalty statute by removing the "safeguard of meaningful appellate review."[11] Gregg v. Georgia, 428 U.S. at 195; Proffitt v. Florida, 428 U.S. 242, 253 (1976).

The Court should grant certiorari to give guidance to the states as to their consitutional obligations in death penalty cases to insure consideration of mitigating factors and to provide meaningful appellate review.

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11 The apparent promise in the statute of meaningful appellate review is also unkept in another respect. It directs the state supreme court to overturn death sentences which are "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C. Gen. Stat. §15A-2000(d)(2). The court has not found any death sentence to be disproportionate. In its first seven affirmances of death peanlties, including petitioner's, the court described its function as determining whether the penalty was "excessive or disproportionate . . . considering both the crime and the defendant without reference "to the penalty imposed in similar cases." State v. Harfield, 298 N.C. 306, 259 S.E.2d 510 (1979), cert. denied, 448 U.S. 907 (1980); State v. McDowell, 301 N.C. 279, 271 S.E.2d 286 (1980), cert. denied, 450 U.S. 1025 (1981); State v. Martin, 303 N.C. 246, 278 S.E.2d 214, cert. denied, ___ U.S. ___, 70 L.Ed.2d 240 (1981); State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981); State v. Rook, 304 N.C. 201, 283 S.E.2d 732 (1981), cert. denied, ___ U.S. ___, 72 L.Ed.2d 155 (1982); State v. Taylor, 304 N.C.

III. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE NORTH CAROLINA SUPREME COURT HAS MISAPPREHENDED THE MEANING OF FURMAN V. GEORGIA, 408 U.S. 238, BY HOLDING THAT A CONSTRUCTION OF ITS DEATH PENALTY STATUTE WHICH WOULD PERMIT A JURY TO RENDER A LIFE VERDICT IF IT MADE THREE SEPARATE FINDINGS REGARDING AGGRAVATING CIRCUMSTANCES WOULD CONSTITUTE UNCONSTITUTIONAL UNBRIDLED DISCRETION.

The majority of the court below construed North Carolina's post-Woodson[12] death penalty statute, N.C. Gen. Stat. § 15A-2000 et seq. (1977), Appendix C, infra, to require - instead of permit - a capital verdict upon certain specific jury findings. 292 S.E.2d at 226-27. Petitioner's jury had been instructed that "it had a duty to recommend a sentence of death if it found three things[13] . . .." 292

Footnote 11 concluded:

249, 283 S.E.2d 761 (1981); State v. Pinch, ___ N.C. ___, 292 S.E.2d 203 (1982). In the first of these cases, the court characterized §2000(d)(2) as providing it "statutory discretion." Barfield, 259 S.E.2d at 544.

In petitioner's case, the dissenter thought it was time that the court advise the bar "the manner in which it conducts its review." 292 S.E.2d at 242. He, joined by two others, 292 S.E.2d at 229-30, believed the court should compare each death penalty with cases which have been reviewed by the court "whether the jury recommended death or life imprisonment." Ibid. In two affirmances since petitioner's, some passing reference has been given to other affirmed death penalty cases. State v. Williams, ___ N.C. ___, 292 S.E.2d 243, 263-64 (1982) (citing all affirmed death cases), and State v. Smith, ___ N.C. ___, 292 S.E.2d 264, 276-77 (1982) (citing two affirmed death cases). Later, in State v. Brown, ___ N.C. ___, 293 S.E.2d 569 (1982), the court noted that it has not said what group of cases it looks to for its comparisons, 293 S.E.2d at 590, and proceeded "to conclude that the sentence is not disproportionate or excessive considering both the crime and the defendant" without reference to any other case. 293 S.E.2d at 591.

Thus, the North Carolina Supreme Court has now affirmed ten death sentences without any semblance of proportionate review even to other death penalty verdicts. The only attempt at such review was in one case, by a dissenting Justice. State v. Rook, supra, 283 S.E.2d 758-61.

12 Woodson v. North Carolina, 428 U.S. 280 (1976).

13 The three required findings were:
"(1) that one or more statutory aggravating circumstances existed; (2) that the aggravating circumstances were substantial enough to warrant the

S.E.2d at 227. (Emphasis in original). Petitioner argued that these instructions violated the statute.[14] He

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Footnote 13 concluded:

death penalty; and (3) that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt." 292 S.E.2d at 227. See N.C. Gen. Stat. § 15A-2000(c)(1), (2) and (3) quoted in footnote 14, infra.

14 The relevent portions of the statute are:

(b) Sentence recommendation by the Jury.--- Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its deliberation in determining sentence. In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (3) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:

(1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (3) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and

(3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned.

If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment; provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation.

(c) Findings in Support of Sentence of Death.--- When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

contended that the three jury findings are necessary, but insufficient, to support a death verdict; that the statute required that the jury still make the final ultimate choice, whether petitioner should be sentenced to die or to life imprisonment; and that therefore the crucial issue in his case had been withdrawn from his jury by the judge's charge.

The North Carolina Supreme Court rejected petitioner's argument based on its belief that otherwise the jury would be permitted "to exercise unbridled discretion . . .," 292 S.E.2d at 227, prohibited by Furman v. Georgia, 408 U.S. 238 (1972).

Justice Exum, in dissent on this point, put the issue clearly:

> I find myself, first, in strong disagreement with the majority on an extremely important new question dealing with the construction of our death penalty statute. The majority holds, after somewhat cursory treatment and a bare-bones anaylsis, that under the statute, G.S. 15A-2000, if the jury finds: (1) the existence of one or more statutory aggravating circumstances, (2) that the aggravating circumstance(s) so found are sufficiently substantial to call for the death penalty and (3) the aggravating circumstance(s) outweigh the mitigating circumstances, then the jury must return the death penalty. Nowhere, of course, does the statute so provide. The majority construes the statute in this way on the sole ground that otherwise the statute would be subject to the constitutional attack that a jury could decide between life and death in its unbridled discretion. Yet decisions of the United States Supreme Court, none of which are mentioned in the

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Footnote 14 concluded:

> (1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and
> (2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,
> (3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

N.C. Gen. Stat. §15A-2000(b) and (c).

majority's discussion,[15] have made it abundantly clear that the majority's interpretation is not constitutionally required. (Emphasis in orignal).

292 S.E.2d at 230. Justice Exum, finding no barrier in this Court's death penalty decisions to the construction of the statute urged by petitioner, proceeded "'to ascertain the intent of the legislature,'" 292 S.E.2d at 230, and concluded that the jury members should be "told that if they answer the crucial issues affirmatively and unanimously, 'you may, although you need not, recommend that the defendant be sentenced to death,'" 292 S.E.2d at 236, an instruction which had been "recommended by the Superior Court Judges Pattern Jury Instruction Committee in May 1979," ibid, but which was replaced in May 1980 after State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979), by the language used by the judge at petitioner's trial.

Since the North Carolina court has interpreted its statute "as it did because it felt under compulsion of federal law as enunciated by this court . . .," Missouri ex rel. Southern R. Co. v. Mayfield, 340 U.S. 1, 5 (1950), a federal question is presented for review. Ibid. State courts are, of course, free to interpret their statutes "solely as a matter of [local] law." Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 568 (1977). However, when a "reading of a whole opinion shows [that the state court

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15 The statement that none of this Court's decisions are "mentioned in the majority's decision" may be somewhat misleading. The majority had said that "defendant's contention was implicitly answered in State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979) . . ." and then quoted from Goodman including the following:

> The exercise of such unbridled discretion by the jury under the court's instructions would be contrary to the rules of Furman and the cases which have followed it. Id. at 35, 257 S.E.2d at 590.

292 S.E.2d at 227. Thus, the court's holding in this case was specifically grounded -- albeit within a quote -- upon its interpretation of this Court's Eighth Amendment decisions.

ruled] not as a matter of statutory construction, but because it thought the Federal Constitution required such action," Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 120 (1924), then a federal question is presented for review by this Court. State Tax Commission v. Van Cott, 306 U.S. 511, 514 (1939). Moreover, a federal question is also presented if the State court decision rests upon both state and federal law but "these two grounds are so interwoven that [this Court is] unable to conclude that the judgment rests upon an independent interpretation of the State law." Ibid. Furthermore, a federal question remains when "doubt" exists as to whether the State court "did not deem itself bound" by the federal considerations, Missouri ex rel. Southern R. Co. v. Mayfield, supra, or where the decision "might have been decided differently if the court below had felt free, under [this Court's] decisions, to do so." Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 443 (1951); United Air Lines v. Mahin, 410 U.S. 623, 632 (1973). See, also Delaware v. Prouse, 440 U.S. 648, 653 (1979).

There is no doubt here that the North Carolina Supreme Court adopted a construction of its statute as it did because it "deem[ed] itself bound," Missouri ex rel. Southern R. Co. v. Mayfield, 340 U.S. at 4, by "'the rules of Furman [v. Georgia, 408 U.S. 238] and the cases which have followed it.'" 292 S.E.2d at 227.

It was expected by the litigants below that this "extremely important new question dealing with the construction of our death penalty statute," 292 S.E.2d at 230 (Exum, J. dissenting), would be controlled by the court's interpretation of Furman. The issue originated from language in the court's decision in State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979). There the jury had been instructed that if it

answered the three statutorily required "issues affirmatively and unanimously, it 'may then recommend the death penalty.' (R. at 185)." 292 S.E.2d at 233 (Exum, J. dissenting). (Emphasis in original). It had not been instructed, as was petitioner's jury, that after making those findings it was then duty bound to recommend death. Goodman argued on appeal that there should have been further instructions that the jury, "'had the option of returning a recommendation of life imprisonment even if aggravating circumstances were found to outweigh mitigating circumstances.' Brief for Defendant Appellant at 15-16." Ibid. The court rejected that argument specifically relying upon its understanding of Furman. The Court held that to adopt Goodman's proposed instructions,

> would be to revert to a system pervaded by arbitrariness and caprice. The exercise of such unbridled discretion by the jury under the court's instruction would be contrary to the rules of Furman and the cases which have followed it.

298 N.C. at 35, 257 S.E.2d at 590.

As noted above, prior to Goodman, the North Carolina Pattern Jury Instructions promulgated by a committee of the Conference of Superior Court Judges had advised trial judges to instruct the jury that it "'may although it need not, recommend that the defendant be sentence to death,'" 292 S.E.2d at 232 (Exum, J. dissenting), upon making the statutory findings. Such instructions "or a variation of them" were given "in a large number of death penalty cases."[16] In some case, where jurors were so instructed, defendants received life sentences notwithstanding affirmative answers to the three issues. Id. at 234 n.4.

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16 Many such cases are listed at 292 S.E.2d at 232 n.3 (Exum, J. dissenting).

In reliance upon Goodman, the Pattern Jury Instructions were changed in May 1980 to impose a "duty to recommend that the defendant be sentenced to death," id. at 233, if the necessary findings were made in favor of the State.

In the North Carolina Supreme Court, petitioner not only advanced arguments in support of his contention that the General Assembly had intended that jurors be permitted to recommend life imprisonment notwithstanding findings of aggravating circumstances sufficient to call for the imposition of the death penalty which outweighed mitigating circumstances; he also sought to respond to the concerns expressed by the court in Goodman that such a construction might run afoul of the prohibitions against unbridled jury discretion.

The State, in its brief, chose to ignore all of petitioner's traditional arguments regarding legislative intent. The court had previously canvassed the legal and legislative history of the 1976 enactment and concluded that the General Assembly had, even more than the legislators of Georgia and Florida, borrowed extensively from the Model Penal Code (MPC). State v. Johnson I, 298 N.C. 47, 56-63, 257 S.E.2d 597, 606-610 (1979).

> The North Carolina statute follows both in broad outline and in detail the MPC even more closely than did the statutes of Georgia and Florida. This is appropriate inasmuch as the concerns to which the MPC was addressed were the same as those considered controlling in the leading opinions of the United States Supreme Court in the cases discussed above.

298 N.C. at 62-63. Petitioner, therefore, argued that since under the models for the North Carolina statute, which had been approved by this Court, juries are free to recommend life regardless of any subsidiary findings, see Proffitt v. Florida, 428 U.S. 242, 248; Gregg v. Georgia, 428 U.S. 153, 165-166, 207; MPC, Section 210.6(2), such a construction of

the North Carolina statute was intended by the General Assembly. The State's brief had no answer to these arguments.

The total thrust of the State's brief was that petitioner's construction would be unconstitutional. Brief for the State, pp. 67-72. "If the jury were allowed to make the further decision requested by the defendant, the jury would be allowed to engage in the very type of unbridled discretion which Furman simply does not allow." Id. at 72.

The State prevailed below on exactly the ground it had advanced. The majority held that petitioner's construction would result in "unbridled" jury discretion allowing the jury "arbitrarily or capriciously [to] impose or reject a sentence of death." 292 S.E.2d at 227 (emphasis in original). The opinion on this point concluded with the quotation from Goodman that "'The exercise of such unbridled discretion by the jury under the court's instruction would be contrary to the rules of Furman and the cases which have followed it.'"[17] Ibid.

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17 The Court's full treatment of petitioner's assignment of error was as follows:

> Both the prosecutor and the trial court advised the jury that it had a duty to recommend a sentence of death if it found three things: (1) that one or more statutory aggravating circumsances existed; (2) that the aggravating circumstances were substantial enough to warrant the death penalty; and (3) that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. On the other hand, the jury was also advised that it had the duty to recommend a sentence of life imprisonment if it did not find any one of those three things. These directions to the jury were based upon the stautory directions to the jury were based upon the statutory criteria set forth in G.S. 15A-2000(b) and (c) and conformed to the N.C. Criminal Pattern Jury Instructions § 150.10 (1980).[16]
>
> Nevertheless, defendant assigns error to the foregoing on the basis that such instructions "prejudically withdrew from the jury its final option . . . to recommend a life sentence nothwithstandng its earlier findings." Defendant's Brief at 75. This assignment lacks merit.

A reading of the "opinion as a whole," State Tax Commission v. Van Cott, supra, shows that the "majority construe[d] the statute in this way on the sole ground that otherwise the statute would be subject to constitutional attack that a jury could decide between life and death in its unbridled discretion." 292 S.E.2d at 230 (Exum, J. dissenting). At the very least, "[g]iving the opinion of the Supreme Court of [North Carolina] a scope most favorable to reliance on a non-federal ground, doubt still remains

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Footnote 17 concluded:

> The jury had no such option to exercise unbridled discretion and return a sentencing verdict wholly inconsistent with the findings it made pursuant to G.S. 15A-2000(c). The jury may not arbitrarily or capriciously impose or reject a sentence of death. Instead, the jury may only exercise guided discretion in making the underlying findings required for a recommendation of the death penalty within the "carefully defined set of statutory criteria that allow them to take into account the nature of the crime and the character of the accused." State v. Johnson [I], 298 N.C. 47, 63, 257 S.E.2d 597, 610 (1979); see State v. Barfield, 298 N.C. 306, 349-52, 259 S.E.2d 510, 541-43 (1979), cert. denied, 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed.2d 1137 (1980). Moreover, defendant's contention was implicitly answered in State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979), in which this Court overruled an assignment of error alleging that the trial court had erred in failing to instruct the jury that it could still recommend life imprisonment even though it found that the aggravating circumstances outweighed the mitigating ones. Justice Britt, speaking for the Court in Goodman, explained that:
>
> > [I]t would be improper to instruct the jury that they may, as defendant suggests, disregard the procedure outlined by the legislature and impose the sanction of death at their own whim. To do so would be to revert to a system pervaded by arbitrariness and caprice. The exercise of such unbridled discretion by the jury under the court's instruction would be contrary to the rules of Furman [v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346] and the cases which have followed it.
>
> Id. at 35, 257 S.E.2d at 590. For these reasons, we hold that the jury was correctly informed that it had a duty to recommend a sentence of death if it made the three findings necessary to support such a sentence under G.S. 15A-2000(c).[17] (Emphases in original; footnotes omitted).

whether that court did not deem itself bound [to rule as it did] by its view of the demands of [this Court's] decisions . . .." Missouri ex rel. Southern R. Co. v. Mayfield, supra. Accordingly, an important federal question emerges. Moreover, "[t]he possibility that the state court might have reached the same conclusion if it had decided the question purely as a matter of state does not create an adequate and independent state ground that relieves this Court of the necessity of considering the federal question." United Air Lines v. Mahin, 410 U.S. 623, 630-31 (1973).

The federal question presented is a critical one for which state courts and legislatures "deserve the clearest guidance that the Court can provide." Lockett v. Ohio, 438 U.S. 586, 602 (1978). It is whether a state procedure which requires, for any capital jury verdict three separate findings regarding statutorily defined aggravating circumtances, but would leave to the jury finally "to dispense mercy on the basis of factors too intangible to write into a statute . . .," Gregg v. Georgia 428 U.S. 153, 222 (Opinion of White, J.), is "consistent and principled but also humane and sensible as to uniqueness of the individual," Eddings v. Oklahoma, ___ U.S. ___, ___, 102 S.Ct. 869, 874, 71 L.Ed.2d, 1, 8 (1982), or allows unbridled discretion condemned by Furman.

Petitioner had thought that it was clear that the extent of jury discretion which would remain if the North Carolina statute were construed as he contended the legislature intended would not be "capricious" in a constitutional sense under Furman, but instead would be "guided" as required by Gregg. That seemed to him to be the holding of Gregg. See, 428 U.S. at 199, 203 (prevailing Opinion); id. at 199 (Opinion of White, J. joined by the Chief Justice and

Rehnquist, J.). Whatever the holding of Gregg, the division of the court below demonstrates that "confusion," Lockett, 438 U.S. at 599, persists as to what satisfies both Eighth Amendment procedural commands "of measured consistent application and fairness to the accused." Eddings v. Oklahoma, ___ U.S. ___, at 102 S.Ct. at 847, 71 L.Ed.2d at 8 (1982).

If the majority below is correct, then this Court should so declare since, as pointed out by Justice Exum, statutes previously before this Court from other States would almost certainly be unconstitutional under Furman. 292 S.E.2d at 234-36. If, on the other hand, Justice Exum's conclusion that "the majority's interpretation is not constitutionally required," 292 S.E.2d at 230, then this Court "should so declare, leaving the State court free to decide the . . . issue solely as a matter of [North Carolina] law." Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 568 (1977); see, also, Delaware v. Prouse, supra; United Air Lines v. Mahin, supra; Perkins v. Benguet Consol. Mining Co., supra; Missouri ex rel. Southern R. Co. v. Mayfield, supra; State Tax Commission v. Van Cott, supra; Red Cross v. Atlantic Fruit Co., supra.

If the decision below remains uncorrected, capital defendants will face trial in North Carolina under a considerably more mandatory statute than the General Assembly may have intended. Moreover, the decision below stands as a bar to any revision of the statute to permit a greater measure of jury discretion as long as the General Assembly desires to maintain a constitutional statute. See, Woodson, 428 U.S. at 300. Accordingly, this Court should grant certiorari in order to "remand the case to avoid the risk of 'an affirmance of a decision which might have been decided differently if the court below had felt free, under [this

Court's] decisions, to do so.' Perkins v. Benguet Consol. Mining Co., 342 U.S. at 443." United Air Lines v. Mahin, 410 U.S. at 632.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Dated: August 31, 1982.

Respectfully submitted,

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Ann Petersen
Assistant Appellate Defender

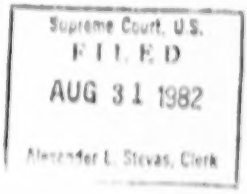
ATTORNEYS FOR PETITIONER

NO. 82 - 5353

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982



MICHAEL EDWARD PINCH

Petitioner

-v.-

STATE OF NORTH CAROLINA

MOTION TO PROCEED IN FORMA PAUPERIS

The petitioner, Michael Edward Pinch, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of North Carolina without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Petitioner's affidavit in support of this motion is attached hereto.

Adam Stein
Appellate Defender
Office of the Appellate Defender
Post Office Box 1070
Raleigh, North Carolina 27602
(919) 733-9490

ATTORNEY FOR PETITIONER

RECEIVED
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SUPREME COURT, U.S.

NO. 82 -

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

MICHAEL EDWARD PINCH

Petitioner

-v.-

STATE OF NORTH CAROLINA

I, Michael Edward Pinch, being duly sworn, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the petitioner in the above-captioned action.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am incarcerated and receive no income from earnings.

3. I am unable to give security for said cause.

4. Counsel is serving on my behalf without remuneration from me. At trial and on appeal, lawyers were appointed to represent me because I was indigent.

5. I believe that I am entitled to redress.

6. The nature of said cause is briefly stated as follows:

I was convicted in the Superior Court of Guilford County, a trial court of the State of North Carolina, of two counts of murder, and was sentenced to death in both cases. I am being held at Central Prison in Raleigh, North Carolina. I believe that errors were committed during the course of my trial in violation of my constitutional rights

and that my convictions and death sentences were imposed upon me in violation of my constitutional rights.

MICHAEL EDWARD FINCH

NORTH CAROLINA

WAKE COUNTY

The foregoing Affidavit of Michael Edward Finch was subscribed and sworn to before me this 24th day of August, 1982.

NOTARY PUBLIC

My Commission Expires

DARLENE I. ALFORD NOTARY PUBLIC WAKE COUNTY, N.C. My Commission Expires August 9, 1986